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No. 88-192 and No. 88-325

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

MCKESSON CORPORATION,
Petitioner,
v.
DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION, and the OFFICE OF THE COMPTROLLER, STATE OF FLORIDA,
Respondents.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,
v.
MAURICE SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, *et al.*,
Respondents.

On Writs of Certiorari to the Supreme Court of Florida and the Supreme Court of Arkansas

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONERS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36 of the Rules of this Court, Tax Executives Institute, Inc. respectfully moves the Court for leave to file the accompanying brief in support of Petitioners in this case as *amicus curiae*. Tax Executives Institute has requested the written consent of all parties to the filing of the accompanying brief. Petitioners and Respondents Division of Alcoholic Beverages, *et al.*, have consented to the filing of the brief, but the written consent of Respondents Maurice Smith, *et al.*, has not been received.*

1. Tax Executives Institute, Inc. is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 4,300 members who represent more than 2,000 of the leading corporations in the United States and Canada. The members of the Institute represent a cross-section of the business community in North America, and the companies represented by the Institute's membership are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the nation and to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers.

2. a. This case addresses the extent to which States may effectively attenuate decisions by this Court that state tax statutes unconstitutionally infringe upon interstate commerce by applying those decisions on a prospective-only basis. Nearly five years ago, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Court invalidated a Hawaii statute under which local products were exempt from the alcoholic beverage tax as repugnant to the Constitution's Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. Earlier this year, the Supreme Court of Florida considered the constitutionality of a substantially similar Florida statute; although ruling on the basis of *Bacchus* that the Florida law violated the Commerce Clause, the Florida court concluded—without even citing the Court's seminal decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)—that its finding of unconstitutionality should apply on a prospective-only basis. *Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 So.2d 1000 (Fla. 1988), *reprinted in* Appendix B to McKesson Corporation's Petition for a Writ of Certiorari (McKesson App. B).

b. Similarly, two terms ago, the Court in *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987), ruled that the Commerce Clause was violated by two Pennsylvania statutes that imposed lump-sum annual taxes on the operation of trucks on Pennsylvania highways. Three days later, a pending case involving a similar Arkansas statute was remanded to the Supreme Court of Arkansas for further consideration in light of that case. *American Trucking Associations, Inc. v. Gray*, 107 S. Ct. 3252 (1987). On March 22, 1988, the Arkansas court held that the Arkansas statute offended the Commerce Clause. The court, however, construed *Chevron* not to mandate the retroactive application of its decision. *American Trucking Associations, Inc. v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), *reprinted in* Appendix A to the American Trucking Associations' Petition for a Writ of Certiorari (ATA App. A). The court not only concluded that no refund need be made of taxes collected

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* The consents of Petitioners and of Respondents Division of Alcoholic Beverages, *et al.*, have been filed with the Clerk of the Court. Respondents Maurice Smith, *et al.*, have neither denied nor granted Tax Executives Institute's request for written consent. If such consent is subsequently received, it shall promptly be filed with the Clerk of the Court.

under the unconstitutional statute before this Court's decision in *Scheiner* but further held that taxes collected *after* the decision—up until the time an escrow was imposed on the State by Justice Blackmun, 108 S. Ct. 2 (1987)—could be retained by the State. ATA App. A at 5a.

3. a. Tax Executives Institute's members have a vital interest in the resolution of the prospective-only issue raised by the *McKesson* and *American Trucking Associations (ATA)* cases. This Court's resolution of these cases will affect far more than the State of Florida's and the State of Arkansas's ability to retain the unconstitutional taxes they have collected from particular taxpayers. The Institute is concerned that the decisions of the Florida and Arkansas courts, if not reversed, could substantially dilute the protection intended by the Commerce Clause. Should the Court affirm either decision, courts and legislatures in other States may well conclude that the Constitution does not bar either the *enactment* of tax statutes that discriminate against interstate commerce or even the *collection* of discriminatory taxes *pendente lite*, but rather only the continued collection of discriminatory taxes after the unconstitutionality of the particular statutes is explicitly confirmed by the Court. Indeed, a disturbing trend in that direction can already be discerned —*see, e.g., Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986), *appeal dismissed for want of final judgment*, 107 S. Ct. 1949 (1987) (remand pending) (the Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), should be applied only to Armco); *National Can Corp. v. Department of Revenue*, 109 Wash.2d 878, 749 P.2d 1286 (1988), *appeal dismissed and cert. denied*, 108 S. Ct. 2030 (1988) (the Court's finding of unconstitutionality in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 107 S. Ct. 2810 (1987), will be applied on a prospective-only basis). Obversely, if the Court reverses the Florida and Arkansas decisions, the right of all taxpayers to be free from taxes that impose undue burdens on interstate commerce will be vindicated and the Commerce Clause itself will be vivified.

b. The members of the Institute and their employers would bear the additional and discriminatory costs that could result from the States' continued misapplication (or nonapplication) of the *Chevron* standard. Because they would consequently suffer the "unreasonable clog upon the mobility of commerce," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935), that could result from the Florida and Arkansas decisions, the Institute has a special and direct interest in the outcome of this case.

WHEREFORE, it is respectfully requested that Tax Executives Institute's motion for leave to file the accompanying brief *amicus curiae* in support of the Petitioners in the case be granted.

Respectfully submitted,

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Date: January 6, 1989

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BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Petitioners. Tax Executives Institute, Inc. is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 4,300 members who represent more than 2,000 of the leading corporations in the United States and Canada. The members of the Institute represent a cross-section of the business community in North America, and the companies represented by the Institute's membership are, almost without exception, engaged in interstate commerce. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the nation and to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers.

SUMMARY OF ARGUMENT

This case addresses the extent to which States may effectively attenuate decisions by this Court that state tax statutes unconstitutionally infringe upon interstate commerce by applying those decisions on a prospective-only basis. Nearly five years ago, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), the Court invalidated a Hawaii statute under which local products were exempt from the alcoholic beverage tax as repugnant to the Constitution's Commerce Clause. *See* U.S. Const. art. I, § 8, cl. 3. Earlier this year, the Supreme Court of Florida considered the constitutionality of a substantially similar Florida statute; although ruling on the basis of *Bacchus* that the Florida law violated the Commerce Clause, the Florida court concluded—without even citing the Court's seminal decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971)—that its finding of unconstitutionality should apply on a prospective-only basis. *Division of Alcoholic Beverages and Tobacco v. McKesson Corp.*, 524 So.2d 1000 (Fla. 1988), *reprinted in* Appendix B to McKesson Corporation's Petition for a Writ of Certiorari (McKesson App. B).

Similarly, two terms ago, the Court in *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987), ruled that the Commerce Clause was violated by two Pennsylvania statutes that imposed lump-sum annual taxes on the operation of trucks on Pennsylvania highways. Three days later, a pending case involving a similar Arkansas statute was remanded to the Supreme Court of Arkansas for further consideration in light of that case. *American Trucking Associations, Inc. v. Gray*, 107 S. Ct. 3252 (1987). On March 22, 1988, the Arkansas court held that the Arkansas statute offended the Commerce Clause. The court, however, construed *Chevron* not to mandate the retroactive application of its decision. *American Trucking Associations, Inc. v. Gray*, 295 Ark. 43, 746 S.W.2d 377 (1988), *reprinted in* Appendix A to the American Trucking Associations' Petition for a Writ of Certiorari (ATA App. A). The court not only concluded that no refund need be made of taxes collected under the unconstitutional statute before this Court's decision in *Scheiner* but further held that taxes collected *after* the decision—up until the time an escrow was imposed on the State by Justice Blackmun, 108 S. Ct. 2 (1987)—could be retained by the State. ATA App. A at 5a.

Tax Executives Institute's members have a vital interest in the resolution of the prospective-only issue raised by the *McKesson* and *American Trucking Associations (ATA)* cases. The Court's resolution of these cases will affect far more than the State of Florida's and the State of Arkansas's ability to retain the unconstitutional taxes they have collected from particular taxpayers. The Institute is concerned that the decisions of the Florida and

Arkansas courts, if not reversed, could substantially dilute the protection intended by the Commerce Clause. Should the Court affirm either decision, courts and legislatures in other States might well conclude that the Constitution does not bar either the *enactment* of tax statutes that discriminate against interstate commerce or even the *collection* of discriminatory taxes *pendente lite*, but rather only the continued collection of discriminatory taxes after the unconstitutionality of the particular statutes is explicitly confirmed by the Court. Indeed, a disturbing trend in that direction can already be discerned —*see, e.g., Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986), *appeal dismissed for want of final judgment*, 107 S. Ct. 1949 (1987) (remand pending) (the Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), should be applied only to Armco); *National Can Corp. v. Department of Revenue*, 109 Wash.2d 878, 749 P.2d 1286 (1988), *appeal dismissed and cert. denied*, 108 S. Ct. 2030 (1988) (the Court's finding of unconstitutionality in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 107 S. Ct. 2810 (1987), will be applied on a prospective-only basis). Obversely, if the Court reverses the Florida and Arkansas decisions, the right of all taxpayers to be free from taxes that impose undue burdens on interstate commerce will be vindicated and the Commerce Clause itself will be vivified.

The members of the Institute and their employers would bear the additional and discriminatory costs that could result from the States' continued misapplication (or nonapplication) of the *Chevron* standard. Because they would consequently suffer the "unreasonable clog upon the mobility of commerce," *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935), that could result from the Florida and Arkansas decisions, *Amicus* Tax Executives Institute has a special and direct interest in the outcome of this case. The Institute respectfully submits that, in light of the States' repeated misapplication of the *Chevron* standard, it may be appropriate for

the Court not only to clarify and thereby vivify that standard, but to give consideration to the adoption of a new standard in respect of state tax statutes found to violate the Commerce Clause. *See Griffith v. Kentucky*, 479 U.S. 314 (1987).

ARGUMENT

I.

A. McKesson: The Florida Statute

The constitutional fate of the State of Florida's alcohol beverage law was effectively sealed by the Court's 1984 decision in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). In that case, the Court addressed whether the State of Hawaii's exemption from the liquor excise tax for local products contravened the Constitution's Commerce Clause. Observing that the presence of either a discriminatory purpose, *citing Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352-53 (1977), or a discriminatory effect, *citing Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), justified a finding of proscribed "economic protectionism," 468 U.S. at 270, the Court concluded that the Hawaii statute violated the Commerce Clause "because it had both the purpose and effect of discriminating in favor of local products." 468 U.S. at 273 (footnote omitted).

In response to the Court's decision in *Bacchus*, the Florida legislature held hearings to consider possible amendments to a Florida statute that was substantially similar to that struck down in *Bacchus*. The legislature removed the word "Florida" from the statute and, in its place, enacted language that, among other things, granted exemptions or tax preferences to wines and distilled spirits manufactured from citrus, sugar cane, and certain grape species, all of which were grown in Florida. The petitioner in No. 88-192, McKesson Corporation, challenged the validity of the revised statute, arguing that it effected the same proscribed, discriminatory re-

sult as its predecessor.[1] The Supreme Court of Florida agreed that the tax scheme placed "a clear discriminatory burden on interstate commerce." McKesson App. B at 11a. The Florida court reasoned that the State's interest in promoting alcoholic beverages made with Florida products was fundamentally at odds with the "general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." McKesson App. B at 18a, *citing Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980).[2]

Notwithstanding its conclusion that the Florida statute was unconstitutional (citing both *Bacchus* and *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977)), the Florida court held that its ruling should not be given retroactive effect. In reaching this result, the court made no reference to this Court's decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), in which the governing standards for gauging the retroactivity of judicial decisions in civil cases were articulated. Rather, the court simply stated:

> We agree with the DABT [Department of Alcoholic Beverages and Tobacco] that the prospective nature of the rulings below was proper in light of the equitable considerations present in this case. *See Gulesian v. Dade County School Board* 281 So.2d 325 (Fla. 1973); *Lemon v. Kurtzman*, 411 U.S. 192 (1973). Not only was the tax preference scheme implemented by the DABT in good faith reliance on a presumptively valid statute, . . . [but] if given a refund, cross-appellants would in all probability receive a windfall, since the cost of the tax has been passed on to their customers.

McKesson App. B at 21a.

[1] One sponsor of the revised Florida statute explained to the legislative committee that the changes were designed "simply to retain what we have done for the last twenty years." McKesson Corporation's Petition for a Writ of Certiorari at 2.

[2] The court quoted the following from *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985): "[I]n Bacchus, although we observed as a general matter that 'a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry,' we held that in doing so, a State may not constitutionally impose a discriminatory burden upon the business of other States, merely to protect and promote local business." 470 U.S. at 877 n.6 (citations omitted), *quoted at* McKesson App. B at 18a-19a.

B. ATA: The Arkansas Statute

From the time of its enactment in 1983, the State of Arkansas' Highway Use Equalization (HUE) Tax was the subject of constitutional attack.[3] Even before the tax went into effect, the petitioners in No. 88-325 brought suit challenging its constitutionality under the Commerce Clause. During the pendency of that litigation, this Court ruled that a substantially similar Pennsylvania tax discriminated unreasonably against interstate commerce and was therefore unconstitutional. *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829 (1987).[4] In the Pennsylvania case, the Court reviewed its prior decisions, and concluded:

> We find dispositive those of our precedents which make it clear that the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States.

[3] Under the Arkansas legislation, heavy trucks operating on the State's highways were required to pay either an annual flat tax of $175 or a tax of five cents for each mile traveled in Arkansas; if a vehicle traveled more than 3,500 miles in a year, it was to the carrier's advantage to elect to pay the flat $175 rate.

[4] ATA's challenge to the Arkansas HUE tax was pending in the Court at the time a decision was rendered in the Pennsylvania case (*Scheiner*). Following the Court's decision, the decision of the Supreme Court of Arkansas was vacated and remanded for reconsideration in light of *Scheiner*. *See American Trucking Associations, Inc. v. Gray*, 288 Ark. 488, 707 S.W.2d 759 (1986), *vacated and remanded*, 107 S. Ct. 3252 (1987).

107 S. Ct. at 2839 (footnote omitted). Among the cases the Court relied on in evaluating the Pennsylvania flat tax was *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), which the Court said had "necessarily called into question the future vitality of earlier cases that had upheld facially neutral flat taxes against challenges premised on the rule of immunity for interstate commerce." 107 S. Ct. at 2846.

Notwithstanding the *Scheiner* decision, the State of Arkansas continued to collect the Arkansas HUE tax.[5] Indeed, the taxes were not even escrowed until August 14, 1987, when the State was ordered to establish an escrow fund by Justice Blackmun (acting in his capacity as Circuit Justice). 108 S. Ct. 2 (1987). On March 14, 1988, the Supreme Court of Arkansas held that there was "little doubt" that this Court would—under *Scheiner*—strike down the Arkansas HUE tax, and accordingly, the Arkansas court held the tax to be unconstitutional. ATA App. A at 2a-3a.

Utilizing *Chevron*'s governing test, the court concluded that its decision should be applied on a prospective-only basis. Indeed, the court extended the period of non-application of the *Scheiner* decision forward to August 14, 1987—the date Justice Blackmun ordered that the HUE taxes be placed in escrow.[6]

C. The Importance of These Cases

Amicus Tax Executives Institute submits that the proper resolution of the retroactivity issue—and the clarification of the standard to be used in resolving particular

[5] The HUE tax was repealed during an October 1987 special session of the Arkansas legislature; in its place, the legislature imposed a replacement tax of 2½ cents per mile, with no ceiling for extensive highway use.

[6] From the time the HUE tax was enacted in 1983 until Justice Blackmun's order of August 14, 1987, approximately $159 million was collected under the discriminatory taxing scheme. ATA App. A at 3a.

cases—is of paramount importance. If the standard is not clarified, other States may conclude that they are free to apply this Court's decisions on a prospective-only basis. Such a result could frustrate the policy underlying the Commerce Clause by allowing the States to enjoy the financial benefits of their discriminatory taxation—the fruits of their own unconstitutional acts. Perhaps more fundamentally, failure to clarify the weight and effect to be given to decisions of the Court could undermine its overall authority as the arbiter of constitutional issues.

II.

Although the Constitution neither prohibits nor requires retrospective effect, *Linkletter v. Walker*, 381 U.S. 618, 629 (1965), the rule remains that "a legal system based on precedent has a built-in presumption of retroactivity." *Solem v. Stumes*, 465 U.S. 638, 642 (1984). *Accord Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2025 (1987). *See generally* L. Tribe, *American Constitutional Law* 29-30 & n.20 (2d ed. 1988).[7] Thus, although exceptions to the rule of retroactivity should be recognized as a matter of policy, the exceptions should not swallow the rule.[8]

In respect of civil cases, the factors to be analyzed in resolving the retroactivity issue were set forth by the Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).[9]

[7] The general rule can be traced to Blackstone. 1 W. Blackstone, *Commentaries* *70-71; *see Norton v. Shelby County*, 118 U.S. 425, 442 (1886); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

[8] *See EEOC v. Vucitech*, 842 F.2d 936, 941-42 (7th Cir. 1988) ("[t]he presumption [is] strongly in favor of retroactive application").

[9] The *Chevron* case did not involve the retroactive effect to be given to a ruling of *unconstitutionality*. Rather, the case addressed the reach of a decision that Louisiana's statute of limitations governed claims for personal injuries sustained on the Outer Continental Shelf off the coast of Louisiana. In *Chevron*, the Court

In that case, the Court confirmed the general rule of retroactivity and held that, in determining whether there should be an exception to that rule, the following three factors should be considered:

- *Reliance*: Whether the decision establishes a new principle of law or involves an issue of first impression whose resolution was not clearly foreseen.
- *Purpose*: Whether, based on the history of the rule in question, its purpose and effect, non-retroactive application will advance or retard the operation of the new rule.
- *Inequity*: Whether non-retroactive application is necessary to avoid injustice or hardship.

404 U.S. at 106-07. *See* Tatarowicz, *Right to a Refund for Unconstitutionally Discriminatory State Taxes and Other Controversial State Tax Issues under the Commerce Clause*, 41 Tax Lawyer 103, 138-39 (1987).

The Supreme Court of Florida in *McKesson* made no reference to *Chevron* in ruling that it need not apply its decision of unconstitutionality retroactively. The State of Arkansas in *ATA* acknowledged the relevance of the Court's decision, but construed it to permit the application of the *Scheiner* case on a prospective-only basis. In doing so, the Arkansas court transmogrified the three-part test of *Chevron* into a standard so pliable that virtually all rulings of unconstitutionality could be applied, at a State's choosing, on a prospective-only basis.

That neither the Florida nor the Arkansas decision can withstand scrutiny under a proper reading of *Chevron* is

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held that its decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), should not apply retroactively to litigants who had relied on several federal cases holding that admiralty law (specifically, the doctrine of laches) controlled the issue. 404 U.S. at 108-09. In *Griffith v. Kentucky*, 479 U.S. 314 (1987), which changed the analysis to be used in criminal procedure cases, the Court confirmed that *Chevron* continues to govern civil cases. 479 U.S. at 322 n.8.

confirmed by analyzing the three factors seriatim. The first factor—whether the decision at issue established a new principle of law—is, of course, the threshold requirement for prospective-only treatment: *if the governing principle was extant at the time of the decision, then the decision must be applied retroactively.*[10]

The principle underlying the instant cases—that discrimination against interstate commerce in the exercise of local taxing authority is unconstitutional—is far from new. Even before *Bacchus* and *Scheiner*, this Court had clearly ruled that the Commerce Clause proscribed tax statutes treating interstate businesses less favorably than local businesses. As the Court observed in *Scheiner*:

> Under our consistent course of decisions in recent years a state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause.

107 S. Ct. at 2841-42, *citing Tyler Pipe Industries*; *Bacchus*; *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977).

Had the Supreme Court of Florida properly applied the *Chevron* standard, it surely would have concluded that its decision had to be given retroactive effect. The Florida court did not break new ground in striking down the Florida alcohol beverage law; it expressly relied on this Court's decisions in *Bacchus* and *Hunt v. Washington State Apple Advertising Commission*—decisions rendered four and eleven years before the Florida court's decision.

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[10] *See United States v. Johnson*, 457 U.S. 537, 550 n.12 (1982) (if the "new principle" standard is not met, *Chevron*'s other two factors need not be considered—the decision will be applied retroactively).

The Florida court did aver that the State had implemented the taxing scheme "in good faith reliance on a presumptively valid statute." McKesson App. B at 21a. All statutes are presumed to be valid, however, until a court otherwise holds. To conclude that a State's spurious "presumption of validity" satisfies the reliance prong of the *Chevron* standard would be to rob the test of all worth: States could act with virtual impunity, knowing that their "reliance" on "presumptively valid statutes" immunized them from constitutional attack. Indeed, States might infer a subtler, more disturbing message from such an approach: perhaps ignorance of the law *is* an excuse.[11]

As to the Arkansas HUE tax, the question whether *Scheiner* represented a "clear break" with prior precedent —thereby leaving open the issue of its retroactive appli-tion—is concededly problematic. From the date of the Court's decision in *Scheiner*, however, the result is clear beyond peradventure: the HUE tax was unconstitutionally discriminatory and any taxes collected under such a tax should be refunded.

Even with respect to pre-*Scheiner* periods, it is not clear that the Arkansas decision survives *Chevron*'s threshold test. The question is not, as the Arkansas court assumed, "whether it was reasonable for the state to have conducted itself as it did" or whether "a reasonable person could easily have found [the tax] to pass Commerce Clause muster." ATA App. A at 3a-4a. Rather, the first *Chevron* factor focuses on whether the decision "overruled clear past precedent" or involved "an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106. In light of the Court's

[11] *See Chapman v. California*, 386 U.S. 18, 21 (1967) (criminal procedure case) ("we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights").

earlier decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the result in *Scheiner* can be said to have been clearly foreshadowed. *American Trucking Association v. Kline*, No. 07-17-1667-85MVT (N.J. Tax Ct. Sept. 8, 1988).[12]

Chevron's second test addresses whether non-retroactive application of the new rule will advance or retard the operation of the new rule. Again, the Florida court was silent on this issue. The Arkansas court, however, proffered a beguiling argument. Specifically, the court quoted from a decision of the Washington Supreme Court in which non-retroactive application of this Court's decision in *Tyler Pipe Industries* was sustained. In that Washington case, the court blithely stated:

> It is difficult to understand how retroactive application would encourage free trade among the states since whatever chill was imposed on interstate commerce is in the past . . . .

National Can Corp. v. Department of Revenue, 109 Wash. 2d 878, 888, 749 P.2d 1286, 1291 (1988), *appeal dismissed and cert. denied*, 108 S. Ct. 2030 (1988), *cited at* ATA App. A at 4a.

Under the Arkansas court's reading of *Chevron*'s purpose test, a ruling of unconstitutionality would never be applied retroactively and the States would have an incentive to enact unconstitutional statutes.[13] The overall

[12] In *Kline*, the New Jersey Tax Court held that *Scheiner* should be applied retroactively. The court stated that "[e]ven if *Complete Auto Transit* did not specifically overrule the *Greyhound* and *Aero Mayflower* cases of 1935, 1947 and 1950, . . . the invalidity of flat taxes which discriminate as a matter of practical effect was clearly foreshadowed by *Complete Auto Transit*." Slip Op. at 9. The *Aero Mayflower* cases—*Aero Mayflower Transit Co. v. Board of Railroad Commissioners*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U.S. 285 (1935)—were cited by the Arkansas court as cases on which it relied in initially sustaining the HUE tax. ATA App. A at 4a.

[13] *See* Tatarowicz, *supra*, 41 Tax Lawyer at 141-42 ("the practical effect [of prospective-only application] would be to permit

result, therefore, would be to retard the purpose of the Commerce Clause.

The courts' treatment of the inequity test in *Chevron* is particularly troubling. Under *Chevron*, the issue is whether prospective application is necessary to avoid injustice or undue hardship. Both the Florida and Arkansas courts devoted precious little time to analyzing any hardship the retroactive application of the decisions might bring. In *McKesson*, the Florida court referred to "equitable considerations," but focused not on any hardship to the State but rather on the "windfall" the petitioners would "in all probability" receive (on the assumption that the unconstitutional taxes could be passed on to customers). McKesson App. B at 21a. The Arkansas court, too, made reference to the "unconscionable windfall" the petitioners would receive if refunds were ordered; it also raised the specter of hardship in its references to the State's having spent or "counted on" the collected unconstitutional taxes. ATA App. A at 4a-5a.[14]

The courts' "windfall" analysis not only lacks factual support [15] but, more fundamentally, focuses on the wrong

states the financial benefits of discriminatory taxation. A state could enact tax laws without concern for constitutional limitation, knowing that, if such laws were ultimately found to discriminate against interstate commerce, they could be repealed with impunity. . . . [T]he prospective application of a finding of unconstitutionality retards the purpose of the commerce clause by offering the inducement of clear financial advantage to those states that violate it.").

[14] That the State had already expended the unconstitutional HUE taxes, or at least taken them into account for budgeting purposes, was the court's justification for refusing to order refunds of the taxes collected during the post-*Scheiner*, pre-escrow period. ATA App. A at 5a.

[15] *See Bacchus*, 468 U.S. at 267 (even if the tax is completely and successfully passed on, taxpayers are entitled to litigate the extent to which the discriminatory tax adversely affected their ability to compete against local producers).

party. The issue is not whether a litigant might enjoy a benefit from lodging a successful challenge to an unconstitutional statute; that is often the case. Instead, it is whether there are factors present that, despite the losing litigant's culpability, militate against the general rule of retroactivity. Thus, the inequity test measures the hardship or injustice that might befall the State (or third parties) and balances that hardship against the right (constitutional or economic) that would be more fully vindicated by the retroactive application of the decision.

Under a properly framed inequity test, there should be no doubt that the "hardship" endured by the States—the required refund of unconstitutional taxes that had been "counted on"—does not pass muster. Indeed, if such a "hardship" were deemed sufficient to justify prospective treatment, unconstitutional tax statutes would rarely, if ever, be overturned retroactively. States invariably spend the revenues they collect. The sounder approach is to examine whether *undue* hardship would result from retroactive application of a decision. Under such an analysis, a different result obtains, for the "hardship" of which the States might complain is one of their own making—the result of their own unconstitutional acts.[16]

In this regard, it is instructive to consider those cases in which the Court has provided relief under the inequity prong of the *Chevron* test (or comparable standards). For example, in *Lemon v. Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*)—which was the only decision of this Court that the Florida court in *McKesson* cited on the retroactiv-

[16] Thus, the courts' suggestion that retroactive application is inappropriate because the petitioners in *McKesson* "in all probability" passed the economic burden of the tax on to customers or because in-state drivers in *ATA* had not sought a refund of the taxes they paid (under a taxing scheme designed to accord them beneficial treatment) has absolutely no bearing on whether the refund of the unconstitutional taxes would impose an undue hardship on the States.

ity issue—the Court limited the effect of its decision two years earlier in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon I*), which invalidated, on First Amendment grounds, a Pennsylvania statute authorizing State reimbursement to private sectarian schools for certain educational services provided by the schools. The hardships of which the Court was concerned in that case were not the State's, but rather those of the private schools that had provided services and incurred expenses in reliance on the constitutionally defective statute. 411 U.S. at 203-04. (Indeed, the State would have been relieved of a financial burden had the Court applied its decision on a retroactive basis.) Similarly, in *Cipriano v. City of Houma*, 395 U.S. 701 (1969), the Court limited the retroactive effect of a decision holding unconstitutional a Louisiana statute permitting only property taxpayers to vote in elections called to approve the issuance of public utility revenue bonds. The hardship addressed by the Court was again not the State's but rather that which would have been suffered by cities and bondholders (who had relied on the state law) had the decision been applied retroactively. 395 U.S. at 706.[17]

Thus, in applying the inequity test, the Court has focused on whether hardship would befall parties or other individuals who did not have it within their power to rectify the situation by adopting the rule in question. The States of Florida and Arkansas clearly did have the

[17] *See also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982) (decision holding the Bankruptcy Act of 1980 unconstitutional applied prospectively because of the substantial injustice and hardship that would otherwise be visited upon litigants who had relied on the statute); *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 722-23 (1978) (decision that city department's employee benefit plan violated Title VII of the Civil Rights Act of 1964, as amended, applied prospectively because of the "devastating" effect retroactivity could have "in large part on innocent third parties"—covered employees).

power to enact constitutional, nondiscriminatory tax statutes.

Moreover, even assuming the States could demonstrate that they would suffer an undue hardship if compelled to refund immediately all unconstitutionally collected taxes, it does not follow—as the Florida and Arkansas courts effectively concluded—that the wronged taxpayers should receive nothing.[18] In appropriate cases, a State might—perhaps under guidelines prescribed by the legislature—craft a refund policy that minimizes the "inequity" the State might otherwise suffer. For example, a State might provide that the taxes unconstitutionally collected (plus an interest factor) could be claimed as a credit on the affected taxpayers' future years' tax returns.[19]

In summary, the Florida court ignored, and the Arkansas court misapprehended, all three of *Chevron*'s tests. Their failure to analyze *Chevron* properly, if not rectified, could be used to sanction prospective-only application in respect of virtually all decisions declaring state tax statutes unconstitutional. Such a result would be pernicious—nullifying the Court's decisions in *Bacchus* and *Scheiner* and frustrating the policy underlying the Commerce Clause.

III.

The questions presented by this case are substantial and important not only because the Florida and Arkansas decisions threaten to eviscerate this Court's holdings in *Bacchus* and *Scheiner*, but also because the Florida and Arkansas cases are but recent examples of the States'

[18] Obviously, the hardship suffered by the States in such an instance would be no greater than the hardship collectively suffered by the taxpayers from whom the taxes were unconstitutionally exacted.

[19] Tatarowicz, *supra*, 41 Tax Lawyer at 143 & n.248. Alternatively, the taxes at issue could be refunded in installments. 41 Tax Lawyer at 143.

misconstruing both the requirements of the Commerce Clause and the standard set forth in *Chevron*. Indeed, during the past five years, there has been a vertiable wave of state court decisions in which discriminatory statutes have been found, in essence, to be unconstitutional on a prospective-only basis.

For example, the State of West Virginia is now contending on the remand of *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986), *appeal dismissed for want of final judgment*, 107 S. Ct. 1949 (1987) (remand pending), that this Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), should be applied only to Armco. Similarly, in *National Can Corp.*, the Supreme Court of Washington refused to give effect to, and refused to pay refunds under, this Court's decision in *Tyler Pipe Industries.*[20] *See also Penn Mutual Life Insurance Co. v. Department of Licensing and Regulation*, 162 Mich. App. 123, 412 N.W.2d 668 (1987), and *Metropolitan Life Insurance Co. v. Commissioner of Insurance*, 373 N.W.2d 399 (N.D. 1985), which both held that the Court's decision in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), invalidating a provision taxing foreign insurers, should apply on a prospective-only basis.[21]

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[20] The Court's disposition of the *National Can* case last term notwithstanding, the Washington court's decision—and its analysis of *Chevron* (which the Arkansas court cited with approval in *ATA*)—underscores the need for the Court to articulate clear standards concerning the prospective-only issue.

[21] For a list of other cases in which state courts have applied decisions that a tax is unconstitutional on a prospective-only basis, see Tatarowicz, *supra*, 41 Tax Lawyer at 117-18 n.89. *Compare American Trucking Associations, Inc. v. Goldstein*, 312 Md. 583, 541 A.2d 955 (1988) (overturning, based on *Chevron*, the State of Maryland's effort to postpone the effective date of the *Scheiner* decision for nearly a year); *American Trucking Association v. Kline*, No. 07-17-1667-85MVT (N.J. Tax Ct. Sept. 8, 1988) (*Scheiner* applied retroactively); *American Trucking Associations, Inc. v. Conway*, [Vt.] State Tax Rep. (CCH) ¶ 200-306 (No. S-147-86WnC) (Vt. Super. Ct., Washington Co., Feb. 11, 1988), *appeal docketed*, No. 88-156 (Vt. Mar. 11, 1988) (*Scheiner* applied retroactively).

These other cases—when viewed in conjunction with the cases at hand—vividly illustrate that the States, at best, misunderstand the balance that is to be struck in considering the retroactivity question and, at worst, have virtually no regard for the policy underlying the Commerce Clause or for the precedents of this Court. State after state has adopted what can be described as a "heads I win, tails you lose" approach to cases implicating the Commerce Clause's proscription on discriminatory tax statutes. If a State prevails in litigation and the challenged statute is sustained, all taxpayers (rightfully) lose. But if a State loses and the statute is found to be constitutionally deficient, the State then declares that the decision established a "new principle" and nimbly concludes that it should receive prospective-only application. As a result, all taxpayers (with the possible exception of the victorious litigant who in any event may have incurred substantial costs) lose.

Such adroit reading of precedent and deft, self-serving application of *Chevron* may enrich the particular State's fisc, but the results can hardly be said to foster the policy underlying the Commerce Clause. If not clarified, the decisions below might not only lead States to ignore Commerce Clause concerns but also discourage taxpayers from challenging clearly discriminatory tax statutes. These facts remain:

- The enactment of discriminatory taxes violates the Constitution.
- The collection of discriminatory taxes violates the Constitution.
- The retention of discriminatory taxes violates the Constitution.

Because the question of the refund of unconstitutionally imposed and collected taxes is one of remedy, it

is properly addresed in the first instance by state courts. *Bacchus*, 468 U.S. at 277; *Scheiner*, 107 S. Ct. at 2847. The remand from this Court in such cases, however, invariably requires that the lower court's disposition of the remedy question be "not inconsistent with this opinion." 468 U.S. at 277; 107 S. Ct. at 2848. The wave of prospective-only holdings that have ensued fail the test of consistency—with respect both to the Commerce Clause and the Court's teaching in *Chevron*. It should be stopped.

IV.

Amicus Tax Executives Institute respectfully submits that, in light of the States' repeated misapplication of the *Chevron* standard, it may be appropriate for the Court not only to clarify and thereby vivify that standard, but to give consideration to the adoption of a new standard in respect of state tax statutes found to violate the Commerce Clause.

Two terms ago, in *Griffith v. Kentucky*, 479 U.S. 314 (1987), this Court considered—and found constitutionally repugnant—the racially discriminatory use by prosecutors of peremptory challenges. Declaring that "[t]he time for toleration has come to an end," 479 U.S. at 323, *quoting United States v. Johnson*, 457 U.S. 537, 555-56 n.16 (1982), the Court concluded that generally new rules for the conduct of criminal prosecutions will be applied retroactively to all pending or non-final cases even if they constitute a "clear break" with the past. 479 U.S. at 328. *See* L. Tribe, *American Constitutional Law* 31 n.26 (2d ed. 1988).

Although cases addressing the validity of discriminatory state tax statutes do not involve considerations of the same magnitude as those presented in criminal procedure cases, such cases do implicate a constitutional right—an interstate business's right under the Commerce Clause to be free from undue state-imposed burdens.

Thus, they involve rights different from, and indeed more significant than, the statute of limitations issue presented in *Chevron*.[22]

In addition, unlike the other civil cases in which the retroactivity issue has been considered, the unsuccessful litigant in a discriminatory state tax case—the party who seeks to have the finding of unconstitutionality applied on a prospective-only basis (the State)—is the progenitor of the proscribed (unconstitutional) action. The States do have it within their power to enact constitutional tax statutes. This fact alone suggests that the States should be held to a higher standard in obtaining exceptions to the general rule of retroactivity. States should not be permitted to reap the benefits of discriminatory taxation while impeding interstate commerce. The States' checkered history in enacting, collecting, and refusing to refund unconstitutional taxes only underscores this conclusion. As this Court stated in *Griffith*, "[t]he time for toleration has come to an end." 479 U.S. at 323.

CONCLUSION

For the foregoing reasons, the Court should reverse the decisions of the courts below.

Respectfully submitted,

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[22] *See* note 9, *supra*.